No. 87-23

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

LLOYD O. LONG, M.D.,
Appellant,

v.

BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARCIA K. HARRISON, and MICHAEL L. and MARCIA K. HARRISON,
Appellees,

v.

FLETCHER BELL, Commissioner of Insurance, State of Kansas,
Intervenor/Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

INTERVENOR-APPELLEE FLETCHER BELL'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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BRADLEY M. HARRISON, a Minor, by and through his Next Friends and Natural Parents, MICHAEL L. and MARCIA K. HARRISON, and MICHAEL L. and MARCIA K. HARRISON,

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ON APPEAL FROM THE SUPREME COURT OF KANSAS

INTERVENOR-APPELLEE FLETCHER BELL'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

Lloyd O. Long, M.D. ("Appellant") appeals from the final decision of the Kansas Supreme Court, dated March 27, 1987. That decision upheld the constitutionality of the Kansas Health Care Provider Insurance Act, K.S.A. 40-3401, et seq., ("the Act"). Fletcher Bell, as Commissioner of Insurance of the State of Kansas, was an intervenor/appellee in the courts below. For the reasons stated herein, Intervenor/Appellee Fletcher Bell, ("Intervenor"), respectfully urges that appellant's appeal be dismissed pursuant to U.S. Sup. Ct. Rule 16.1(b), 28 U.S.C.A., or,

in the alternative, that appellant's appeal be affirmed in accordance with U.S. Sup. Ct. Rule 16.1(d), 28 U.S.C.A.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas is reported as *Harrison v. Long*, 241 Kan. 174, 734 P.2d 1155 (1987). The Journal Entry of the District Court of Sherman County, Kansas, dated June 16, 1986, from which the appeal to the Kansas Supreme Court was taken, is not reported. Both of these decisions are reproduced in the Appendix to Appellant's Jurisdictional Statement, and thus, Intervenor will not include them in the Appendix to these instant motions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, Section 1, United States Constitution; Section 18, Bill of Rights, Kansas Constitution; Kansas Statutes Annotated, § 40-3401, et seq. (1981).

The above-mentioned constitutional provisions, and pertinent portions of the statutes, are set forth in the Appendix to these instant motions.

STATEMENT OF THE CASE

Appellant Lloyd O. Long, M.D. is a physician licensed to practice medicine in the State of Kansas. On June 28, 1984, an action for medical malpractice was instituted against appellant by appellees Bradley M., Michael L. and Marla K. Harrison, in the District Court of Sherman County, Kansas. That action arose out of appellant's rendition of medical treatments to appellee Bradley M. Harrison in approximately January, 1983.

At the time of the acts giving rise to this action, the Act required all "resident health care providers," (which includes physicians) practicing in Kansas to acquire and maintain a policy of professional liability insurance which provided basic coverage in an amount equal to or in excess of $100,000.00 per occurrence and $300,000.00 annual aggregate; (those amounts have subsequently been raised). K.S.A. 40-3402(a) and 40-3401(f). Appellant had in force and effect at that time a policy of professional liability insurance conforming to these minimum requirements.

The Act also created and defined the Health Care Stabilization Fund ("the Fund"), which is administered by Intervenor. K.S.A. 40-3403(a). The Fund is responsible (with certain limitations) for the payment of that amount of any judgment or settlement in a medical malpractice case which exceeds the basic coverage afforded the defendant-physician under his mandatory policy of professional liability insurance. K.S.A. 40-3403(c)(1). Health care providers must pay an annual surcharge to the fund in order to qualify for this excess coverage. K.S.A. 40-3404(a).

Under K.S.A. 40-3410, whenever the basic insurer of a health care provider agrees to tender the limits of its coverage in order to settle a claim, but that claim exceeds the amount of such coverage, the commissioner is authorized to negotiate with the claimant on an amount to be paid out of the Fund. When such an amount is agreed upon, the claimant must then file a petition in the court where the underlying action is pending, for the approval of the agreement. A hearing is promptly called, with notice to the claimant, the health care provider, and the commissioner. The court will approve the settlement between the claimant and the Fund if it is found to be valid, just and equitable.

Appellant's insurance carrier, St. Paul Fire and Marine Insurance Company (St. Paul) and the Fund entered into negotiations with the appellees, and eventually effected a settlement of the lawsuit against appellant. That settlement was approved by the District Court of Sherman County, Kansas by Journal Entry dated June 19, 1985. That settlement was reached over appellant's objections.

On June 28, 1985, appellant sought relief in the District Court from the Journal Entry approving the settlement. Appellant's motion for relief was denied on June 16, 1986. Appellant then brought and perfected an appeal to the Kansas Supreme Court, challenging the constitutionality of that part of the Act which allows the Fund to settle actions over the objections of the defendant-physician.

On November 7, 1986, the Fund moved for leave to intervene in that appeal, and on November 17, 1986, that motion was granted by the Kansas Supreme Court. By decision dated March 27, 1987, the Kansas Supreme Court

affirmed the decision of the District Court of Sherman County, Kansas. Appellant subsequently caused the instant appeal to be docketed with this court.

REASONS WHY THIS APPEAL SHOULD BE DISMISSED

This appeal should be dismissed pursuant to U.S. Sup. Ct. Rule 16.1(b), 28 U.S.C.A., as Intervenor will demonstrate below.

A. Appellant Lacks Standing To Challenge The Act

This appeal should be dismissed because appellant lacks standing to challenge the Act.

1. Standing In General

In order to raise a constitutional challenge, a person must first demonstrate that he has "standing." It has been stated that standing requires the person have "a personal stake in the outcome of the controversy." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977). In other words, the challenged conduct must cause the person injury. That injury need not be economic, and it may be indirectly inflicted; but it must be sustained by the person himself and it must be fairly traceable to the challenged conduct. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, 48 L.Ed.2d 450 (1976).

The Kansas Supreme Court determined that appellant had standing to challenge the Act. That conclusion is not

binding on this Court, though. Rather, this Court will undertake an independent assessment of the appellant's standing (or lack thereof). *Cramp v. Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278, 282, 82 S.Ct. 275, 278, 7 L.Ed.2d 285 (1961).

In the case of *Duke Power Co. v. Carolina Environmental Study,* 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), this Court held that standing requires the coexistence of three factors: injury in fact to the plaintiff; "individuated injury"; and causation in fact. Appellant's situation fails to satisfy these requirements.

Turning to the first two of these three factors, there is no evidence in the record in this case to support appellant's assertion that he has in fact suffered a distinct and palpable injury. Appellant alleges that he has suffered a loss of reputation, an increase in his malpractice insurance premiums, and an increase in the surcharge which is collected by the Fund pursuant to the Act. However, there is no evidence in the record to support any of these claims. All appellant has offered in support of these allegations are bald assertions by his counsel at oral argument before the Kansas Supreme Court. Appellant has therefore failed to document adequately his asserted injury in fact, or his assertion of "individuated injury." That failure is fatal to his claim of standing.

Even assuming that appellant's naked assertions of injury are sufficient to satisfy the first two requirements for standing, he must still demonstrate the third requirement—causation. Intervenor submits that appellant's bare assertions of causation are not sufficient to satisfy that requirement. Appellant maintains that it is the *settling*

of the claim against him that has caused his asserted injuries. Because of the lack of any evidentiary record on this subject, it is impossible to determine whether the *settling* of the claim had these effects, or whether appellant's asserted injuries occurred simply as the result of the *making* of a claim against him. In fact, because of the total lack of any evidence on this subject, it is even possible to surmise that appellant's asserted injuries resulted from circumstances wholly unrelated to the instant case. To employ the words this Court used in *Duke Power Co.*, supra, there is not a "fairly traceable causal connection between the claimed injury and the challenged conduct." 438 U.S. at 72, 98 S.Ct. at 2630. As such, appellant has failed to meet the basic requirements for standing, and this appeal should be dismissed.

2. Appellant Is Estopped From Challenging The Act

Even though a party has standing to sue, he may still be estopped from challenging a statute's constitutionality if he has voluntarily claimed or accepted the benefits bestowed by that statute. As this Court stated in *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947):

> In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. Plaintiffs challenge the constitutional validity of the only provision under which proceedings may be taken to liquidate or conserve the Association for the protection of its members and the public. If it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets, it may perpetually go on, notwithstanding any abuses which its management may perpetrate. It would be intolerable that the Congress

> should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. We hold that plaintiffs are estopped, as the Association would be, from challenging the provisions of the Act which authorize the Board to prescribe the terms and conditions upon which a conservator may be named.

332 U.S. at 255-256, 67 S.Ct. at 1557.

Like the Congressional enactments under attack in *Fahey v. Mallonee,* supra., the provisions of the Act which appellant assails were designed to protect the public. The provisions appellant assails are also inseparable from the rest of the Act. The Fund could not long exist if it did not have some measure of control over its potential liability, and thus, its economic vitality. As the Kansas Supreme Court has held, the mandatory malpractice insurance required by the Act bears a rational relationship to the health and welfare of the citizens of Kansas, not only by providing protection to patients who are injured as a result of medical malpractice, but also by assuring that there is an adequate supply of health care providers in Kansas. *State ex rel. Schneider v. Liggett,* 223 Kan. 610, 616, 576 P.2d 221, 227 (1978). Similarly, as the Kansas Supreme Court held in its opinion in this case:

> For the same reasons, the provisions of the Act now questioned by Dr. Long are upheld as they provide an overriding state interest in maintaining adequate health care providers in the state, as well as providing sufficient amounts to cover the economic costs of a claimant's injuries caused by medical malpractice.

241 Kan. at 182, 734 P.2d at 1161. Being the final pronouncements of the highest court in Kansas on a question of the interpretation of a state statute, these interpretations of the Act are binding on this Court. *Chandler v. Florida*, 449 U.S. 560, 570, 101 S.Ct. 802, 807, 66 L.Ed.2d 740 (1981).

Appellant has clearly availed himself of the Acts' benefits and protections for many years. The Act came into existence in 1976. Since that time, physicians such as appellant have needed only the basic, minimum professional malpractice insurance coverage. For potential liability over and above that amount, resort could be had to the Fund. Thus, for as long as appellant has been a "resident health care provider" (as defined by K.S.A. 40-3401 [f] and 40-3402[a]), appellant has enjoyed a real and substantial benefit—a measure of protection from potential liability that might only be available to him at a greater price on the open market, if it was available at all in the absence of the Act. Appellant has apparently always paid his surcharge without protest; thus, his acceptance of the Act's benefits was voluntary. And finally, in this very case, the appellees' claims against appellant were dismissed with prejudice after the Fund paid appellees out of its own resources. Appellant himself has had to assume no personal liability in this case.

Despite his acquiescence in the validity of the Act, and his enjoyment of its protections, appellant now challenges a portion of the Act designed to protect the public. Justice and equity are not served by this action on appellant's part. For all these reasons, appellant should be estopped from challenging the very same provisions of the Act which he has voluntarily and knowingly accepted the benefits of in the past.

B. This Appeal Does Not Present A Substantial Federal Question

This appeal should be dismissed because its does not present a substantial federal question.

As this Court held in *Martin v. Walton,* 368 U.S. 25, 26, 82 S.Ct. 1, 2, 7 L.Ed.2d 5 (1961), *reh. denied* 368 U.S. 945, 82 S.Ct. 376, 7 L.Ed.2d 341, where it appears that state laws are not beyond the allowable range of state action under the Fourteenth Amendment, then no substantial federal question is presented, and the appeal should be dismissed. Likewise, an objection to a state court's application of state law does not raise a substantial federal question. *Agins v. City of Tiburon,* 447 U.S. 255, 259, n.6, 100 S.Ct. 2138, 2141, n.6, 65 L.Ed.2d 106 (1980).

As intervenor will show in the following sections of this brief, the state-law questions in this appeal outweigh and overshadow any federal questions here presented and the decision in this case rests on an adequate non-federal ground. By deciding this case on state law grounds, the Kansas Supreme Court has insulated itself from review by this Court. *Payton v. New York,* 445 U.S. 573, 600, n.52, 100 S.Ct. 1371, 1387, n.52, 63 L.Ed.2d 639 (1980). For these reasons, this Court should dismiss this appeal pursuant to U.S. Sup. Ct. Rule 16.1(b), because it does not present a substantial federal question.

C. The Decision Of The Kansas Supreme Court Rests On An Adequate Non-Federal Basis

This appeal should be dismissed because the decision of the Kansas Supreme Court rests on an adequate non-federal basis, and thus, this Court lacks jurisdiction over

this appeal. *Michigan v. Long,* 463 U.S. 1032, 1038, n.4, 103 S.Ct. 3469, 3475, n.4, 77 L.Ed.2d 1201 (1983).

Appellant claims to possess a federally-protected property interest in the status of being a defendant. That is to say, appellant claims that those protions of the Act which permit the Fund to settle cases over the physician's objections deprived him of his right to vindicate his name in court and to avoid all the injuries appellant claims he suffered as a result of the settlement of appellees' case against him. This, claims appellant, was a deprivation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

The cornerstone of any due process claim is the existence of a protected interest in either liberty or property. If there is no such protected interest, then due process considerations never come into play. *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 544-545, 97 S.Ct. 1932, 1959, 52 L.Ed.2d 531 (1977). The issue of whether there is a valid interest to protect is one which should be decided at the outset, because resolution of that threshold issue can avoid many needless due process adjudications. *Pinckney v. District of Columbia,* 439 F.Supp. 519, 530 (D.C.C. 1977).

Property interests are protected by the Constitution, but they are not created by it. They owe their existence to state law. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The typical bases for such interests are contracts and state laws—"rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U.S. at 577, 92 S.Ct. at 2709.

Appellant asserts that Section 18 of the Bill of Rights of the Kansas Constitution creates the protected property right to defend oneself in court against a civil claim for damages which he claims. Section 18 states:

> All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

Intervenor has consistently argued that Section 18 only protects plaintiffs from a system of discriminatory access to the state courts. According to previous holdings by the Kansas Supreme Court, Section 18 is not an absolute bar to a change in the common law of the state. See, e.g., *State ex rel. Schneider v. Liggett,* 223 Kan. at 612-613, 576 P.2d at 224 (1978).

The Kansas Supreme Court obviously agreed with Intervenor's arguments, for that court rejected appellant's contention that Section 18 created a property interest which the Act then deprived appellant of, and held that Section 18 creates no protected property right to defend oneself in court. See 241 Kan. at 179, 734 P.2d at 1160. That court also held that the Act does not violate Section 18 of the Kansas Constitution directly. See 241 Kan. at 182, 734 P.2d at 1161. The correctness of these decisions will be discussed, infra. It seems sufficient to say at this point that the Kansas Supreme Court, having spoken on a subject of state law, (i.e., the constitutionality of a state statute under the state constitution, as well as the effect of a state constitutional provision), is the final authority on that subject, and this Court has no jurisdiction to review those determinations of state law. See *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890).

Appellant's claim that the Act violates Section 18 of the Bill of Rights of the Kansas Constitution has been rejected by the highest court of that state. Likewise, appellant's claim that Section 18 creates a property interest, or right to insist that an action not be settled over one's objections, has also been rejected by the Kansas Supreme Court. Because these purely state-law determinations adequately and completely dispose of this case, and because these determinations do not unreasonably infringe on a federal right, there is no reason, and indeed, no right, for this Court to address appellant's federal due process claim. See *Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935); *NAACP v. State of Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Accordingly, this Appeal should be dismissed for lack of jurisdiction.

———o———

REASONS TO AFFIRM THIS APPEAL

In the alternative to his Motion to Dismiss, Intervenor submits that this case should be affirmed pursuant to U.S. Sup. Ct. Rule 16.1(d), 28 U.S.C.A., as shown below.

A. The Decision Of The Kansas Supreme Court Was Correct

The decision of the Kansas Supreme Court should be affirmed by summary disposition because that decision is correct in all respects. Three independent grounds support this conclusion.

1. The Presumption of Constitutionality Enjoyed by Legislative Enactments Holds Sway in This Case.

When assessing the constitutionality of a statute, there is a strong presumption in favor of constitutionality. *Parham v. Hughes,* 441 U.S. 347, 351, 99 S.Ct. 1742, 1745, 60 L.Ed.2d 269 (1979). The basic purpose of the courts is to save, not to destroy, the Acts of the legislature when this can reasonably be done. *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,* 413 U.S. 548, 571, 93 S.Ct. 2880, 2893, 37 L.Ed.2d 796 (1973). All insignificant doubts should be resolved in favor of the constitutionality of the enactment, e.g., *Toombs v. Citizens' Bank of Waynesboro,* 281 U.S. 643, 647, 50 S.Ct. 434, 436, 74 L.Ed. 1088 (1930), and a statute should be declared unconstitutional only when it appears so beyond any reasonable doubt, e.g., *Adkins v. Children's Hospital,* 261 U.S. 525, 544, 43 S.Ct. 394, 396, 67 L.Ed. 785, 24 A.L.R. 1238 (1922).

As noted above, the presumption in favor of constitutionality is a strong one. It becomes even stronger when the Act in question has a history of acquiescence in its propriety. *Life and Casualty Co. of Tennessee v. McCray,* 291 U.S. 566, 572, 54 S.Ct. 482, 485, 78 L.Ed. 987 (1934). Thus, it is important that the Act here involved has been treated as valid by the governmental officials empowered with its administration. See, e.g., *Tulsa v. Southwestern Bell Tel. Co.,* 75 F.2d 343 (10th Cir. 1935), cert. denied 295 U.S. 744, 55 S.Ct. 656, 79 L.Ed. 1690 (1935). Of equal, if not more importance, is the fact that vast sums of money have been invested for many years in reliance on the rights and interests granted by the Act. See, e.g., *Los Angeles*

County v. Southern California Tel. Co., 196 P.2d 773, 32 Cal.2d 378 (1949), *appeal dismissed* 336 U.S. 929, 69 S.Ct. 737, 93 L.Ed. 1090 (1949).

The Fund has accumulated a truly vast sum of money for use as prescribed in the Act. Over the years, the Fund has also paid out large sums in the performance of its function. In addition, numerous resident health care providers have relied on the Act, by paying their surcharges and counting on the Fund's excess coverage. The innumerable class of successful plaintiffs (past, present and future) has also relied on the Fund, even if unknowingly. Based upon this long history of justified reliance on the statutory scheme, including large investments of capital, and the wide-reaching, adverse consequences of a sudden disruption in this system, the presumption of constitutionality should prevail in this case. The conclusion of the Kansas Supreme Court to this same effect, being correct, should be affirmed by summary disposition.

2. Appellant's Claim Of A Property Interest Is So Unsubtantial As Not to Need Further Argument.

Appellant's claim to a property interest in being (and remaining) a defendant in a civil action, for the purpose of vindicating himself of the tort claims being asserted against him in that action, is a paltry one at best. That claim is so unsubstantial that it should be rejected summarily, and this case should be affirmed without further argument.

To the best of Intervenor's information and belief, no court in the history of American jurisprudence has held as appellant would have this Court hold. It is assumed

by Intervenor that appellant has researched long and hard for a case directly in point and supporting his position. And yet, appellant has never been able to cite even one such case to any court before which this case has appeared. From this total lack of results, despite diligent research by both parties, the logical conclusion is that no such case exists.

To be sure, the cases are legion which hold that a plaintiff's cause of action is a protected property interest. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982). However, there is a vast difference between holding that a plaintiff may not be denied his day in court on his claim, and holding that a defendant may insist that an action against him not be settled, just so he can vindicate himself by prevailing in that action.

Unlike the plaintiff, then, whose cause of action is protected by the Constitution from dilution or extinction, the defendant in a civil action has no right to insist that the plaintiff prosecute the action to fruition. This legal premise is demonstrably proven by the fact that under the Kansas Code of Civil Procedure, an action can be voluntarily dismissed at the behest of the plaintiff. While court approval of a voluntary dismissal is required at some stages in the proceedings, and the court also has the power to condition the dismissal for the defendant's protection, the defendant has no absolute right to prevent a voluntary dismissal of the plaintiff's case unless he has asserted a counterclaim (which in essence makes him a plaintiff as well as a defendant). See K.S.A. 60-241(a). This Kansas rule mirrors Rule 41 of the Federal Rules of Civil Pro-

cedure, 28 U.S.C.A. Both these rules are derived from the common law of civil procedure, and so come down to us with long histories.

Likewise, a defendant who is not a counterclaimant has no right to prevent the final settlement of the action, so long as that settlement imposes no personal liability upon that defendant. Of course, the Constitution requires that before a defendant may be held *personally* liable to the plaintiff, either a judgment must be rendered against that defendant after proceedings which comply with the requirements of due process of law, or the defendant must consent to a settlement which personally obligates him to the plaintiff. But where (as here) an insurer and the Fund have settled the action without any personal liability attaching to the appellant, appellant may not complain that the action was settled before he had an opportunity to vindicate himself of the charges made against him.

From the established proposition that Section 18 of the Kansas Constitution does not grant civil defendants the right to prevent the settlement of an action by an insurer, so long as the defendant incurs no personal liability as a result of the settlement, it follows that appellant did not have a protected property right to prevent the settlement of this action by the Fund. Because appellant had no such interest, no due process violation occurred when the Fund settled plaintiffs' claims against appellant, for no process is due if there is no interest to protect. Accordingly, the decision of the Kansas Supreme Court is correct and in conformity with the general rule in every particular. That decision should be affirmed by summary disposition because the questions raised by appellant are so unsubstantial as not to need further argument.

3. The Act Contains Adequate Due Process Safeguards.

And finally, this appeal should be affirmed because whatever rights or interests appellant is deemed to possess, the Act contains adequate due process safeguards to protect those rights and interests.

The following discussion assumes, *arguendo,* that appellant is deemed to have standing, that he has not waived that standing, and that under Kansas law he has a property interest worthy of due process protection. Nevertheless, and in spite of all these indulgences in his favor, appellant still has no valid due process claim under the Fourteenth Amendment, because the Act prescribes a system of judicial oversight sufficient to satisfy the requirement of Section 1 of that Amendment.

The term "due process" is not susceptible to a fixed and rigid definition. Due process is not a static concept, but is one which varies with the circumstances of each individual case. The cornerstones of due process are notice of the charges against one and an opportunity to be heard at a meaningful time and in a meaningful manner. The precise process which is required is based on the balancing of a number of factors: the nature of the individual interest which is affected, the nature of the government interest involved and the likelihood that procedural protections will be effective in avoiding erroneous deprivations of the private interest. See, e.g., *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

The private interest involved in this case is identified by appellant as his interest in preserving his professional reputation. Intervenor submits that there are also com-

peting governmental interests involved in this case, and that the requirements of due process must strike a fair balance between these various competing interests.

The primary governmental interest advanced by the Act is the assurance that an adequate supply of quality health care is available in Kansas. The legislature has determined that one way to promote this interest is to assure that malpractice insurance is readily available to physicians practicing in Kansas. The Fund, created by the Act, provides substantial excess coverage over the basic coverage all physicians must maintain. The Fund thus serves the important interest of assuring that successful plaintiffs will have a viable economic source for satisfaction of judgments in excess of the amount of the physician's basic insurance coverage.

If, as appellant suggests, health care providers are to be allowed to "opt-out" of Fund coverage, and become self-insurers in malpractice action *after* the action is filed, then the injured plaintiff may eventually obtain a substantial judgment against a provider who is unable to satisfy such a large judgment. The statutory scheme must of course accomodate all of the competing interests mentioned above, and it does so admirably. Any other conclusion would completely emasculate the mandatory coverage provisions of the Act, which were upheld from an attack not unlike appellant's in *State ex rel. Schneider v. Liggett, supra,* 223 Kan. at 616, 576 P.2d at 226-227.

In order to serve the variety of interests it does, the Fund must obviously maintain its own solvency. To this end, a centralized mechanism was established by the legislature, so that one entity (ie, the Fund) could oversee

virtually all medical malpractice cases in Kansas. The Fund has the obvious benefit of being able to compare and contrast past and present cases, and to share its expertise with private defense attorneys. The decision to settle a claim which exceeds the defendant's basic coverage is often guided by economic considerations: The Fund chooses to accept a certain amount of liability rather than risk the potentially greater liability that might result from a jury verdict against the provider. If providers could force the Fund to go to trial, rather than being allowed to settle large adverse jury verdicts could threaten the fiscal integrity of the Fund. The personal ego of the provider must not be elevated above the financial well-being of the Fund.

As Intervenor has shown, there are a number of competing interests involved in this case. None of these competing interests are trivial, and all are well served by the Act's regulatory scheme. As the Kansas Supreme Court held below, the Act bears a rational relationship to the furtherance of these legitimate governmental interests, and is thus constitutional.

Against the backdrop of these competing interests, one must now evaluate the procedural protections which are in place to monitor the operation of the Fund. K.S.A. 40-3410 establishes the procedural framework for judicial overview of the Fund's operations. Any proposed settlement between a claimant and the Fund must be given court approval, after a hearing, upon a finding that the settlement is valid, just, and equitable. The provider is given notice of the hearing and is permitted to appear and be heard. Appellant took advantage of these procedures in this case, but the settlement was approved over his objec-

tions. Nevertheless, this procedural framework is adequate to satisfy the requirements of due process, both in theory and in actual practice under the facts of this case.

Weighing and balancing the competing interests in this case, as must be done in every case involving due process analysis, it is indisputable that the statutory scheme created by the Act does not violate the Due Process Clause of the Fourteenth Amendment. This is true whatever quality this Court may ascribe to the interest claimed by appellant, even if his right to vindicate himself as the defendant in a civil suit is accorded the full status of a federally-protected property interest. And last, even if this Court entertains some doubts as to the adequacy of the Act's procedures, the adequacy of the state-law grounds for the state supreme court's decision, independent of appellants' federal due process claim, obviate the need for this Court to decide the claim. *International Longshoremen's Ass'n, AFL-CIO v. Davis*, — U.S. —, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

CONCLUSION

In summation, this appeal should be dismissed because appellant lacks standing to challenge the Act; appellant is estopped from challenging the Act; this appeal does not present a substantial federal question; and the decision of the Kansas Supreme Court rests on an adequate, non-federal basis.

In the alternative, this appeal should be summarily affirmed because the decision of the Kansas Supreme

Court upholding the constitutionality of the Act was correct; the questions raised by appellant are so unsubstantial as not to need further argument; and the Act contains procedural safeguards sufficient to satisfy the Due Process Clause of the Fourteenth Amndment.

For all of the above and foregoing reasons, this appeal should be dismissed, or, in the alternative, the decision of the Kansas Supreme Court from which appellant appeals should be affirmed by summary disposition.

Respectfully submitted,

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APPENDIX

U.S. Const., Amendment XIV, Section 1, states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kansas Const., B. of R., Section 18, states:

> All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

Pertinent portions of the Kansas Health Care Provider Insurance Act, K.S.A. 40-3401, *et seq.*, provide:

> A policy of professional liability insurance approved by the commissioner and issued by an insurer duly authorized to transact business in this state in which the limit of the insurer's liability is not less than one hundred thousand dollars ($100,000) per occurrence, subject to not less than a three hundred thousand dollar ($300,000) annual aggregate for all claims made during the policy period, shall be maintained in effect by each resident health care provider as a condition to rendering professional service as a health care provider in this state . . .

K.S.A. 40-3402(a), (since amended)

> 'Health care provider' means a person licensed to practice any branch of the healing arts by the state board of healing arts . . .

K.S.A. 40-3401(f)

> For the purpose of paying damages for personal injury or death arising out of the rendering of or the

failure to render professional services by a health care provider, self-insurer or inactive health care provider subsequent to the time that such health care provider or self-insurer has qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund . . .

K.S.A. 40-3403(a).

Subject to subsections (d), (e), (f) and (i), the fund shall be liable to pay: (1) Any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable resident health care providers or resident self-insurers for any personal injury or death arising out of the rendering of or the failure to render professional services within or without this state . . .

K.S.A. 40-3403(c)(1).

[T]he commissioner shall levy an annual premium surcharge on each health care provider who has obtained basic coverage and upon each self-insurer for each fiscal year. Such premium surcharge shall be an amount equal to a percentage of the annual premium paid by the health care provider for the basic coverage required to be maintained as a condition to coverage by the fund by subsection (a) of K.S.A. 40-3402 and amendments thereto . . .

K.S.A. 60-3404(a).

When the insurer of a health care provider or inactive health care provider covered by the fund has agreed to settle its liability on a claim against its insured or when the self-insurer has agreed to settle liability on a claim and the claimant's demand is in an amount in excess of such settlement, or where a claim is against an inactive health care provider covered by the fund who does not have liability insurance in effect which is applicable to the claim, or where it would otherwise

be in the best interest of the fund, the claimant and the commissioner may negotiate on an amount to be paid from the fund. The commissioner may employ independent counsel to represent the interest of the fund in any such negotiations. In the event the claimant and the commissioner agree upon an amount the following procedure shall be followed:

(a) A petition shall be filed by the claimant with the court in which the action is pending against the health care provider or the inactive health care provider, or if none is pending, in a court of appropriate jurisdiction, for approval of the agreement between the claimant and the commissioner.

(b) The court shall set such petition for hearing as soon as the court's calendar permits, and notice of the time, date and place of hearing shall be given to the claimant, the health care provider or inactive health care provider, and to the commissioner.

(c) At such hearing the court shall approve the proposed settlement, if the court finds it to be valid, just and equitable . . .

K.S.A. 40-3410,(a)-(c).